

Federal Court



Cour fédérale

Date: 20181012

Docket: T-603-16

Citation: 2018 FC 1030

Vancouver, British Columbia, October 12, 2018

PRESENT: The Honourable Madame Justice Simpson

Docket: T-603-16

BETWEEN:

THEODORE H. KONYI

Plaintiff

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA**

Defendant

JUDGMENT AND REASONS

I. PROCEEDING

[1] Mr. Theodore H. Konyi [the Plaintiff] is a businessman who claims that instalment payments were made to the Canada Revenue Agency [the CRA] on his behalf towards taxes owing in the 1996 tax year in the total amount of \$284,287.00 [the Payments]. The Plaintiff

argues that the CRA has been unjustly enriched in that it has refused to apply the Payments to reduce his income tax debt.

[2] The CRA denies that the Payments were made and also submits that the action is statute-barred by the *Limitation Act*, RSBC 1996, c 226 [*1996 Limitation Act*].

[3] Darryl Cardey testified for the Plaintiff. He is the former CFO of many of the Plaintiff's companies and the Plaintiff's bookkeeper. He testified that he did not actually recall making the Payments. However, he said he would have made them to the CRA using cheques [the Cheques] drawn on Kirkton Holdings, which is one of the Plaintiff's holding companies. He also testified that the CRA acknowledged receipt of these Payments in a document called an Instalment Reminder dated February 1997.

[4] The evidence showed that the original Instalment Reminder would have been a two-sided form on a single sheet. Ms. Lee testified for the CRA that the front of the single sheet would have borne the heading "Instalment Reminder" and the back of the sheet would have been titled "1996 Instalment Payment Summary". Both sides of the form would have shown the Plaintiff's name and social insurance number at the top of the page. In this case neither the original nor a sample of the form were available. Instead the Plaintiff relied on a photocopy composed of two separate sheets. Sheet one was titled Instalment Reminder [the Reminder] and the second sheet was titled 1996 Instalment Payment Summary [the Summary].

[5] The purpose of the Reminder was to indicate the amounts the Plaintiff was to pay by way of instalment payments in March and June of 1997.

[6] The purpose of the Summary was to indicate the amount the Plaintiff had paid as instalments in 1996 so that it could be reported on his 1996 income tax return.

[7] On page one the Reminder stated:

This Instalment Reminder gives you

- ...
- ...
- a summary of your 1996 instalment payments we received as of January 02, 1994 (see the back of this reminder)

[My Emphasis]

[8] The Reminder displays the Canadian flag and states the Plaintiff's name and social insurance number at the top. According to Ms. Lee, this information would also have appeared at the top of the page on the original summary. However, no reference to the Plaintiff appears on the Summary in evidence. In the result, there was nothing in print on the Summary to link it to the Plaintiff.

[9] The Plaintiff suggests that the Summary relates to him, notwithstanding the absence of his name and social insurance number, because the Payments are roughly appropriate for someone with his income in 1996. Mr. Youngman's evidence is that the Plaintiff's income for 1996 would be estimated and that 40% would be paid as installment payments. If the Summary

is accurate, it means that the Payments of \$284,278 represented 40% of the Plaintiff's projected income. His projected income would therefore have been \$710,695. In fact his income was \$769,124.00 so the estimated income was low by \$58,429. Accordingly, in my view, the amount of the Payments is not sufficient to be treated as the only link to the Plaintiff.

[10] The relevant portions of the Summary read as follows:

This summary acknowledges receipt of instalment payments up to January 02, 1997. [...]

Date	Description	Amount
March 15, 1996	Payment	\$21,762.00
June 14, 1996	Payment	21,761.00
September 13, 1996	Payment	120,378.00
December 16, 1996	Payment	120,377.00
January 02, 1997	Total payments received for 1996	<u>\$284,278.00</u>

[...]

Where do you enter your instalment payments on your 1996 tax return?

You should enter the total amount of the instalment payments you sent us for 1996 on line 476 of your federal income tax return. As of January 02, 1997, our records indicate that this amount was \$284,278.00.

[11] Mr. Youngman was the Plaintiff's accountant and is also a lawyer. He specialized in tax matters, and prepared the Plaintiff's 1996 income tax return. His firm was also authorized by the Plaintiff to deal with the CRA on income tax matters. He testified for the Plaintiff and said that he received the two page photocopy of the Reminder and the Summary which is Plaintiff's Exhibit 2, and used it to report the figure of \$284,278.00 on the Plaintiff's 1996 income tax return.

[12] I am not that persuaded that Mr. Youngman ever saw the original two sided form. He only gave evidence to that effect in response to a leading question asked in re-examination. It is

clear that a photocopy which included the summary was in use in his office and it is likely that it was before Mr. Youngman as he initially testified. I have reached this conclusion because Judith Andrews, Mr. Youngman's associate, is referred to in the CRA's diary notes as describing the summary as being "attached" to the reminder. In my view, she would not have described it this way if the summary was on the reverse side of the original reminder.

[13] The fact that the Payments of \$284,278.00 were reported on the Plaintiff's 1996 return is confirmed in a document produced by the CRA titled "Income Tax Return Information – Regular". However, the document also indicates that in an assessment dated August 5, 1997 [the Assessment] the Payments were disallowed.

[14] The CRA's diary notes also show that on September 11, 1997, following receipt of the Assessment, Judith Andrews spoke with the CRA and was told that it could not find any record of the 1996 Payments. She was asked to produce the four cheques which were used to make the Payments. These cheques were never provided to the CRA. Mr. Youngman testified that he asked Mr. Cardey for the cheques but did not follow up with him when they were not forthcoming.

[15] The CRA says that the Plaintiff has not met his burden of proof because he has not produced:

- the original summary or even a photocopy showing at the top that it relates to him. The CRA notes that the Plaintiff acknowledged in his testimony that the Summary he relies on could relate to another tax payer;

- Cheques evidencing the Payments;
- books of account or banking statements from Kirkton Holdings showing that the Payments were made.

[16] The CRA does not concede that the Summary is a CRA document because it lacks the normal references to the Plaintiff. In the alternative, if it is a CRA document, the CRA says that it was not issued to the Plaintiff because it does not show the information found for the Plaintiff on the CRA's database. It shows that the Plaintiff was not actually required to make any instalment payments in 1996. For this reason the CRA submits that the Payments listed on the Summary were not made on the Plaintiff's behalf. It is noteworthy that the Plaintiff testified that no instalment payments would have been made in years when they were not required.

[17] The CRA relied on two kinds of information in its computer records to show that no instalment payments were required in 1996. The first was a statement of account for the Plaintiff which showed that in July 1995 he was issued a refund of \$4,121.61. Ms. Lee said that this meant that no tax had been due in 1994. Her evidence was that to have instalment payments due in 1996 the Plaintiff had to owe net tax in excess of \$2,000.00 in both 1994 and 1995. In her view because the refund shows that this requirement was not met in 1994, no instalment payments would have been due in 1996.

[18] I am not satisfied that this evidence was accurate. It was given in a very confused fashion and, as I understood it, it did not make sense. To my mind, the payment of a refund does not necessarily mean that no tax was payable. It may mean that taxes were overpaid.

[19] However, the second item of evidence from the CRA on this point took the form of printed screens from the CRA's database, which is used to generate reminders and summaries. The screens for the Plaintiff in tax year 1996 show that no instalment reminder or receipt information was found or existed. The instalment payment reminder screen for 1997 showed on page one that for "a summary of your 1996 instalment payments we processed as of January 2, 1997 (see the back of this reminder)" [My emphasis]. The reminder showed zero payments received. The CRA says that these screens mean that no payments were due or received in 1996. I accept this evidence.

[20] The Plaintiff made submissions about a proper interpretation of the database screens in final argument. However these suggestions made were not put to Ms. Lee so CRA had no opportunity to respond to them.

[21] The Plaintiff said that there was a difference in the wording found on the Reminder in evidence and on the version of the reminder on the screen. In the Reminder, the payments are described as "received" and on the screen they are described as "processed". The suggestion therefore is that the database did not generate the Reminder. For the reason describe above, there is no evidence from the CRA about this language change, i.e. what it might mean and when it was made. However, in my view, the difference is not material because the CRA cannot process a payment unless it is received. The meaning of received and processed in this context is the same.

Conclusion on the issue of the Payments

[22] For all these reasons I am not satisfied that the Summary produced by the Plaintiff reflects Payments made on his behalf in 1996. No payments were due according to the CRA's

records and the Plaintiff was clear that, in that situation, no payments would have been made. Mr. Cardey acknowledged that he could not recall making the Payments and, when asked in 1997 he did not produce the relevant Cheques. This leads to the reasonable inference that they did not exist. Finally, the photocopy of the Summary in evidence does not include the Plaintiff's name and social insurance number as Ms. Lee said it should. In these circumstances, the Summary does not clearly link to the Plaintiff.

II. Limitations

[23] I turn now to the question of limitations and have concluded for the following reasons that this action is statute barred.

[24] The evidence from Mr. Youngman, who was the Plaintiff's agent on tax matters, shows that when he received the Assessment of August 5, 1997 he became aware that the Payments he had reported on the Plaintiff's income tax return for 1996 had been disallowed. He was also made aware in September 1997 that the CRA could not find evidence of the Payments and had asked for the Cheques to prove that the Payments had been made. The CRA never resiled from its position that the Payments had not been made.

[25] Mr. Youngman testified that he asked Mr. Cardey for the Cheques but did not pursue them when they were not produced. Mr. Youngman also explained in his evidence that he did not mention the CRA's failure to credit the Payments when he filed the Notice of Objection and the appeal [the Appeal] in respect of the Plaintiff's 1996 tax year because the Tax Court did not then

have jurisdiction to deal with them. However, he acknowledged that he could have raised the issue of the disallowed Payments in Federal Court.

[26] It was Mr. Youngman's evidence that, because there was very likely to be a reassessment of the Plaintiff's 1996 return as a result of the Appeal, he felt that the Payments would be recognized at that time. In his experience in other matters, the CRA had sometimes indicated that it could not find funds only to later locate them because they had been credited incorrectly. In other words, Mr. Youngman did not view the CRA's Assessment and its request for the Cheques as a problem that required his prompt attention. Although he did not have the Cheques, he relied on the Payments described in the Summary as having been made even after the CRA called the accuracy of the Summary into question.

[27] It is also significant to note that, although he did not recall it in his testimony at trial, the evidence is clear that, in 1997 the Plaintiff also knew that the Payments had been disallowed in the Assessment. His lawyer's letter of September 19, 2014 reads as follows:

You have asked whether or not Mr. Konyi raised any concerns with the CRA when the 1996 instalment payments claimed on the 1996 return were disallowed. The answer to that question is yes, immediately and on an ongoing basis from the time the Notice of Assessment for 1996 was received.

[28] Notwithstanding this knowledge in 1997, both the Plaintiff and Mr. Youngman submit that the limitation period should not begin to run until November 2014 when the Appeal relating to his 1996 income tax year was settled and his 1996 tax year was reassessed. They say that only then did it become clear that the CRA was not going to give the Plaintiff credit for the Payments.

[29] In my view, this argument is not persuasive. The CRA gave clear notice in the Assessment that the Payments were disallowed and in the following month it advised that it would only consider changing its position if the Cheques were produced. The CRA's position was clear in 1997 and it never changed.

[30] Contrary to the Plaintiff's submissions, the CRA was not obliged to take further steps to make its position known. Further, it was not reasonable to await the reassessment after the Appeal because the Appeal did not deal with the Payments. Mr. Youngman's reliance on the summary and his expectation that the CRA would discover the Payments when the Appeal was resolved caused the Plaintiff to miss the expiry of the limitation period.

III. Conclusion on the Issue of limitations

[31] I have concluded, because this is a case sounding in the tort of unjust enrichment, and because, in my view, the action was discovered in 1997, section 30(3), which is the transitional provision of the current British Columbia *Limitation Act*, SBC 2012, c. 13, applies to mean that section 3(5) of the former British Columbia *Limitation Act*, RSBC 1996, c. 266 creates a six-year limitation period. Since the claim arose in 1997, the Plaintiff had until 2003 to commence this action. Since the action was not commenced until April 14, 2016, it is statute barred.

IV. Overall Conclusion

[32] This action will be dismissed with costs.

JUDGMENT in T-603-16

UPON hearing the evidence adduced by both parties in Vancouver, British Columbia on October 3 and 4, 2018;

AND UPON hearing the submissions of counsel for both parties;

THIS COURT'S JUDGMENT is that this action is dismissed with costs because:

1. It is statute barred; and
2. The Plaintiff has failed to prove that the Payments were made on his behalf.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-603-16

STYLE OF CAUSE: THEODORE H. KONYI v HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: OCTOBER 3, 2018 AND OCTOBER 4, 2018

JUDGMENT AND REASONS: SIMPSON J.

DATED: OCTOBER 12, 2018

APPEARANCES:

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